



**In the Matter of:**

**JEANNE SAYRE,**

**ARB CASE NO. 03-069**

**COMPLAINANT,**

**ALJ CASE NO. 00-CAA-7**

**v.**

**DATE: May 31, 2005**

**VECO ALASKA, INC., &  
ALYESKA PIPELINE SERVICE  
COMPANY,**

**RESPONDENTS.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Alene Anderson, Esq., Anderson Seldon P.C., Seattle, Washington; Robert C. Seldon, Esq., Anderson Seldon P.C., Washington, D.C.**

*For the Respondents:*

**Thomas M. Daniel, Esq, Helena L. Hall, Esq., Perkins Coie LLP, Anchorage, Alaska**

### **FINAL DECISION AND ORDER**

Jeanne Sayre alleges that VECO Alaska, Inc. and Alyeska Pipeline Services Company violated the employee protection, or “whistleblower,” provisions of four statutes when VECO reprimanded, suspended, and finally terminated her employment.<sup>1</sup>

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<sup>1</sup> The Clean Air Act, 42 U.S.C.A. § 7622 (West 2003); the Federal Water Pollution Prevention Control Act, 33 U.S.C.A. § 1367 (West 2001) (Clean Water Act); the Toxic Substance Control Act, 15 U.S.C.A. § 2622 (West 2005), and the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976, 42 U.S.C.A. § 6971

Continued . . .

To succeed on her claim, a whistleblower like Sayre must prove by a preponderance of the evidence that her employer retaliated against her because she engaged in protected activity. Sayre did not carry this burden of proof. Therefore, we must dismiss her complaint.<sup>2</sup>

### **JURISDICTION AND STANDARD OF REVIEW**

A U. S. Department of Labor Administrative Law Judge (ALJ) heard this case and, in a Recommended Decision and Order (R. D. & O.), concluded that Sayre's complaints should be dismissed. *Sayre v. VECO Alaska Inc. and Alyeska Pipeline Servs. Co.*, 2000-CAA-00007 (ALJ Feb. 26, 2003). 29 C.F.R. § 24.8 and Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) give the Administrative Review Board (ARB or the Board) jurisdiction to review the ALJ's recommended decision. The Administrative Procedure Act authorizes the ARB, as the Secretary's designee, to act with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's recommended decision. See 5 U.S.C.A. § 557(b) (West 2004); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 97-CAA-2, slip op. at 15 (ARB Feb. 29, 2000).

### **BACKGROUND**

#### ***The Drawing Update Project***

The Trans Alaska Pipeline System (TAPS) stretches from the North Slope of Alaska approximately 800 miles south to Valdez, Alaska. Alyeska operates TAPS for the oil companies that own it. VECO contracts with Alyeska to provide engineering services for the pipeline. During the relevant period, VECO was updating engineering drawings

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(West 2003). The environmental whistleblower protection provisions prohibit employers from discharging or otherwise discriminating against any employee "with respect to the employee's compensation, terms, conditions, or privileges of employment" because the employee engaged in protected activities such as initiating, reporting, or testifying in any proceeding regarding environmental safety or health concerns. See 29 C.F.R. § 24.2 (2004).

<sup>2</sup> Sayre contends that Alyeska Pipeline Services Company, with which VECO contracted to provide engineering drawing services, was her co-employer and violated the whistleblower provisions by failing to exercise its authority to protect her from VECO's unlawful acts. Because we find that VECO did not violate the whistleblower provisions, we do not reach Sayre's contingent complaint against Alyeska.

of TAPS pump stations to show modifications that had been made to structures and equipment since their original construction. Transcript (Tr.) 47, 50.

Jeanne Sayre worked for VECO as a drawing designer at Pump Station 7 (PS 7) from May 1997 until January 2001. PS 7 is in central Alaska, about 50 miles north of Fairbanks. Sayre had a high school diploma, eight weeks of electrical designing following high school, and about 20 years experience. Her job was to update engineering drawings of PS 7 buildings and equipment to show their current configuration. Drawing revisions ranged from minor administrative changes, such as correcting misspellings or incorrect drawing numbers, to substantive changes such as “redlining” a drawing to show that a facility had been re-built or to show where new equipment had been installed. Tr. 46-49, 101, 106, 641-642, 1447-1449; Sayre Exhibit (SX) 131.

To accomplish her mission, Sayre worked with another VECO designer at PS 7. They lived and worked at the station in alternating two-week shifts. Dave Walters was their team leader. Sayre had to coordinate with VECO employees in Fairbanks who were responsible for entering drawing updates into a centralized electronic data base, providing Sayre with computer codes as needed, and making associated changes to equipment tags. Sayre also needed to work with and take instruction from Alyeska engineers and managers who were responsible for operating PS 7. Joanne Johnson, district manager of VECO’s Fairbanks office, supervised 50 employees, including Sayre. Tr. 52-56, 76, 132-133, 136-140, 144, 148, 149, 158, 174, 187-196, 1282-1283, 1895, 897; SX 99, 201, 207, 159-168; Joint Exhibit (JX) 4, 22.

### ***Sayre’s Prior Whistleblower Complaints***

Before working at PS 7, Sayre had worked for VECO at another TAPS pump station, PS 3, until March 1997. When VECO laid her off, Sayre filed a whistleblower complaint in which she alleged that VECO terminated her employment because she had criticized the drawing update project. VECO contended that it eliminated Sayre’s position as part of a general reorganization. Nevertheless, VECO reinstated Sayre at PS 7 while her PS 3 complaint was still in litigation. Then, in May 1999, while she was working at PS 7, a Labor Department ALJ decided the PS 3 complaint in her favor. VECO and Alyeska appealed but then settled the case with Sayre. Tr. 49; *Sayre v. Alyeska Pipeline Servs. Co.*, ARB Nos. 99-091, 99-092, ALJ No. 97-TSC-6 (ARB Sept. 30, 1999) (Order Approving Settlement and Dismissing Case).

Thereafter, in her second year at PS 7, Sayre filed another whistleblower complaint against VECO and Alyeska. She alleged that Johnson criticized her communication style and forced her to attend communications coaching in retaliation for Sayre’s PS 3 complaint and testimony. The Department of Labor’s Occupational Safety and Health Administration (OSHA) investigated and determined that Sayre’s complaint had merit. *See* 29 C.F.R. Part 24; Tr. 68, 69; SX 36. VECO requested that an ALJ hear the case but later withdrew its request. *Sayre v. VECO Eng’g*, No. 1999-CAA-0019 (ALJ Aug. 5, 1999) (Order Granting Motion to Withdraw Appeal).

### *Sayre's Current Whistleblower Complaint*

From 1999 to 2000, Sayre's coworkers complained three times that Sayre was creating a hostile work environment that impeded their work. VECO investigated each complaint. In January 2000, as a result of the first investigation, VECO president John Conway issued Sayre a written reprimand for not working constructively with coworkers.<sup>3</sup> Then, in May 2000, after the second investigation, Conway issued another reprimand and suspended Sayre for two weeks without pay for failure to work constructively with colleagues. Finally, in January 2001, Conway's successor, Val Molyneux, reviewed the third investigation and fired Sayre because of her continuing divisiveness. JX 22, 34, 47; Sayre Motion to Amend Complaint January 26, 2001.

Sayre claims that the reprimands, suspension, and termination violate her whistleblower rights. She contends that VECO imposed the discipline because she complained about the drawing update project to Alyeska, the Joint Pipeline Office (JPO, a consortium of state and federal agencies that oversees the pipeline), and state and federal agencies themselves. Tr. 111. Sayre claims that work on the project did not conform to Alyeska's internal standards and procedures or to federal and state requirements such as fire, electrical, and engineering codes. As a result, she alleges, many drawings were incorrect. In Sayre's view, correct drawings are vital to safe operation of the pipeline. SX 1; Sayre Motion to Amend Complaint, June 23, 2000; Sayre Motion to Amend Complaint, January 26, 2001.

The ALJ consolidated Sayre's various whistleblower claims. After a hearing, he found that Sayre's criticism of the drawing update project was protected by the whistleblower provisions of the four statutes, that VECO was aware of Sayre's criticism, and that VECO took adverse action against Sayre. He found, however, that Sayre did not prove that VECO disciplined her because of her protected activity. Instead, he found that VECO reprimanded, suspended and fired Sayre because of the destructive manner in which she interacted with her co-workers. R. D. & O. at 93, 95, 98-99, 103-104.

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<sup>3</sup> Conway also reprimanded Sayre for insubordination and not following rules. JX 22, VECO Exhibit (VX) 1. These matters fall under the rubric of failure to cooperate with colleagues, and, for brevity's sake, we refer to the entire range of Sayre's misconduct in that way.

## DISCUSSION

### A. The Legal Standard

To prevail in a whistleblower case brought under these four statutes, the complainant must prove by a preponderance of the evidence that: (1) she engaged in protected activity, (2) her employer knew of the protected activity, (3) her employer took adverse employment action against her, and (4) her protected activity was the reason for the adverse action. See *Higgins v. Alyeska Pipeline Servs. Corp.*, ARB No. 01-022, ALJ No. 99-TSC-5, slip op. at 5 (ARB June 27, 2003); *Tracanna v. Arctic Slope Inspection Servs.*, ARB No. 98-168, ALJ No. 97-WPC-1, slip op. at 5 (ARB July 31, 2001).

### B. Sayre Did Not Prove that VECO Discriminated.

#### *The January 2000 Reprimand*

In late September 1999, the designer group leader, Dave Walters, reported to the Fairbanks district manager, Johnson, that two or three members of the group had complained to him that Sayre was creating a hostile work environment by her dictatorial and confrontational manner. As a result, Walters reported, Sayre's co-workers were avoiding her, which interfered with their work. Tr. 1664-1671, 1684-1685, 1702; JX 59; SX 9.

Johnson relayed Walters's complaint to VECO's human resources manager, Lynn Palazzotto. Palazzotto served as VECO's liaison to the Employee Concerns Program (ECP) that Alyeska provided for its own and its contractors' employees. Palazzotto forwarded Walters's complaint to ECP for investigation. As VECO's ECP liaison, Palazzotto generally participated in ECP investigations of complaints like Walters's. But Sayre objected to Palazzotto's involvement, arguing that Palazzotto would be biased against her. Tr. 326, 1764-1765, 1982-1984, 1989; SX 9.

VECO responded to Sayre's objection by hiring a human resources consultant to conduct an independent investigation. The consultant, Robert Atkinson, interviewed Johnson, Walters, Sayre, and members of the designer team, and in a report to VECO, concluded that Sayre was prone to dismiss any viewpoint not her own. Atkinson wrote that, instead of trying to reach agreement so work could proceed, Sayre tended to turn differences of opinion into full blown disputes. Tr. 1989-1993; JX 4.

Based on Atkinson's report, VECO president Conway reprimanded Sayre in January 2000. Conway summarized Atkinson's findings and advised Sayre that she must show improvement in working with her colleagues, communicating with her supervisor, and following procedures. Tr. 954-955; JX 22; SX 108.

Sayre challenged the reprimand by filing a whistleblower complaint (one of the complaints that the ALJ consolidated herein) in February 2000. Sayre alleged that the

reprimand was retaliation for her criticisms about the drawing update project that she had voiced to ECP and state and federal agencies. Sayre said that Atkinson was biased against her because he was a personal friend of VECO vice president Mike Ebersole and that Johnson manipulated Atkinson so he would erroneously conclude that Sayre was creating a hostile work environment. SX 1; VX 51, 56; Sayre Motion for Stay and Joinder, March 6, 2001.<sup>4</sup>

The ALJ determined that Sayre proved that she had engaged in protected activity when she criticized the drawing update project and that VECO was aware of her protected activity. R. D. & O. at 93. Neither VECO nor Alyeska challenges these findings, and the record supports them. Accordingly, we treat these elements of Sayre's claim as uncontested.<sup>5</sup>

Nor does VECO challenge the ALJ's finding that the January 2000 written reprimand was an adverse employment action. Alyeska, however, argues that this reprimand is not an adverse employment action and cites our decision in *Shelton v. Oak Ridge Nat'l Labs.*, ARB No. 98-100, ALJ No. 95-CAA-19, slip op. at 8 (ARB Mar. 30, 2001). Alyeska Opening Br. (A. O. Br.) at 11. In *Shelton*, we held that written criticism is not adverse action unless it directly causes a tangible job consequence, such as loss of pay. But here a connection exists between the first written reprimand and the suspension without pay and termination that Sayre later suffered. Conway specified that he reprimanded Sayre again and suspended her without pay because he had already reprimanded her for the same misconduct. JX 34. Similarly, VECO president Val Molyneux decided to fire Sayre in January 2001 because she had failed to improve after receiving two reprimands and a suspension. Tr. 9-14; JX 47. Thus, we find that the January 2000 written reprimand was an adverse employment action.

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<sup>4</sup> Even before Conway issued the reprimand, Sayre filed a whistleblower complaint alleging that Johnson and Walters fabricated the hostile work environment charge and that VECO's decision to investigate the bogus complaint was itself an act of retaliation. SX 1; VX 51, 56. We treat these allegations as part of Sayre's claim that the first reprimand was the product of Johnson and Walters's collusion, discussed below. We also note that Sayre conceded at the hearing that VECO's decision to investigate Walters's complaint was not retaliatory. Tr. 330, 611, 632.

<sup>5</sup> We find that Sayre engaged in protected activity when she filed whistleblower complaints with OSHA, testified in the October 1998 hearing, and complained to OSHA about Johnson in 1999. But on this record we find it virtually impossible to tell which of her complaints about deficiencies in the drawing update program relate to safety and are therefore protected. See e.g., SX 72, 82, 131, 198, 199, 201, 202, 205; AX 132; Tr. 61-62, 85-102.

Still, the ALJ found that Sayre did not prove by a preponderance of the evidence that Conway reprimanded her because of her protected activity. R. D. & O. at 93. We agree because the record supports this finding.

Conway testified that Sayre's criticisms about the drawing project played no role in his decision to reprimand her. Tr. 954-955. Rather, he issued the reprimand because Atkinson reported that Sayre did not work constructively with others but instead created roadblocks to productivity. *Id.*; JX 22. Sayre did not rebut this testimony or prove that the reprimand was a pretext for discrimination. *Cf. Masek v. The Cadle Co.*, ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 12 (ARB Apr. 28, 2000) (complainant's ultimate burden is to prove both that the employer's stated reason was false and that discrimination was the real reason).

Moreover, Conway's testimony is consistent with the fact that both in the written reprimand and in a personal meeting with Sayre, he offered her the option of transferring to VECO's Anchorage office. Tr. 417, 419; JX 22. This offer conflicts with Sayre's theory that Conway had a secret agenda against her because she was criticizing the drawing update project. Accordingly, we find that Sayre did not meet her burden of proving by a preponderance of the evidence that VECO reprimanded her because she criticized the drawing update project.

### ***The May 2000 Reprimand and Suspension***

In March 2000, Sayre participated in a VECO-Alyeska meeting about the status of the North Pole Meeting Station (NPMS). The purpose of the meeting was to develop a "punch list," or "to-do list," of work that needed to be completed so the project could be closed. Tr. 210, 1600, 1786. The participants agreed to make all decisions by consensus. JX 23.

During the meeting, Sayre raised questions about the safety of an exhaust vent, whether certain builder blue prints needed professional engineer certification (PE stamps), and whether more city work permits were needed. Tr. 212-226, 1637-1640, 1786-1789. The other participants agreed that someone from the group would investigate the vent issue and that they would refer the PE stamp question to Alyeska's Technical Standards Group, which was responsible for interpreting regulations. Tr. 422. The engineers in the group reported that the NPMS had been built outside Fairbanks city limits to avoid city permit requirements, and on that basis the group decided no action was necessary on the permit issue. Tr. 422, 430, 436, 1611, 1631, 1791; SX 59, 172.

Sayre did not tell the group that she had discussed each issue with relevant state agencies. Tr. 421-431. Nor did she tell them that the city permits she was talking about would come from the city of North Pole, not Fairbanks, as the group assumed. Tr. 268-273, 432-433. And in the minutes of the meeting that she was responsible for producing, Sayre did not report the group's consensus on the three issues. Instead, she wrote that the vent location violated the fire code, that the builder prints did need PE stamps, and that

permits from the city of North Pole were needed. In addition, Sayre wrote that she would be investigating each of these matters. Tr. 421-443; JX 23 Attach. B.

Sayre's misreporting disturbed both VECO and Alyeska employees. Tr. 1455-1458. The Alyeska engineer responsible for the NPMS asked Johnson to see to it that the minutes were corrected. Tr. 1876. Johnson requested that Sayre correct the minutes to show the group's actual decisions. JX 60. Sayre declined. *Id.* An Alyeska official eventually corrected the minutes. Tr. 1879.

What is more, in another memorandum about the NPMS meeting, Sayre implied that her VECO colleagues had done no work for 18 months on an important project and stated that she would take over the project and see it to completion. SX 159. As a result, the VECO employee responsible for this project filed a complaint with ECP, stating that he and others had been working on it for the entire time and that Sayre was falsely impugning his reputation. JX 49; SX 109, 171.

VECO hired Atkinson to investigate this ECP complaint. Tr. 2009. After interviewing Sayre and six others present at the meeting, Atkinson prepared a report. JX 23. He found that Sayre did not accurately report what took place at the NPMS meeting, that she failed to comply with VECO/Alyeska procedures for resolving issues by, among other things, assigning herself tasks assigned to others, and falsely indicated that project personnel were not working as assigned. *Id.*

Based on Atkinson's report, Conway reprimanded Sayre and suspended her for two weeks without pay. Tr. 254-255, 2012-2014. Conway warned Sayre that continued unsatisfactory job performance could lead to further disciplinary action, including discharge. Tr. 954-955; JX 34.

The ALJ found that Sayre engaged in protected activity when, at the meeting, she expressed safety concerns. He found that VECO was aware of her protected activity and that the reprimand and suspension were adverse actions. R. D. & O. at 98. Neither VECO nor Alyeska challenges these findings, and we accept them as undisputed. But, again, the ALJ found that Sayre failed to establish a causal link between her protected activity and the reprimand and suspension. R. D. & O. at 99.

Sayre argues that VECO disciplined her because she went outside the chain of command for information about possible safety code violations and, at the meeting, indicated that she planned to go to the State Board of Engineering about the PE stamps. S. O. Br. at 1, 38, 50. Tr. 1787. But Johnson, who was at the meeting, testified that Sayre had the right to go to state agencies about her concerns so long as she acted in her personal, not official, capacity. Tr. 1787, 1791-1792. And Sayre confirmed that Johnson had never forbidden her to go to state agencies. Tr. 268. In short, Sayre did not produce evidence that Conway reprimanded and suspended her for contacting, or intending to contact, outside agencies about her safety concerns.



All in all, Sayre did not prove that Atkinson's findings, upon which Conway based his decision to reprimand and suspend her, were pretexts for discrimination. And Sayre's brief never comes to grips with VECO's arguments or Conway's testimony that he reprimanded and suspended her because of the false NPMS meeting minutes. Indeed, we are surprised that Sayre challenges the May 2000 reprimand and suspension, since she conceded at the hearing that she was not cooperative at the NPMS meeting, that she deliberately misled the group, and that she knew her minutes did not reflect the group's decisions. Tr. 421-442. Therefore, like the ALJ, we find that Sayre failed to establish by a preponderance of the evidence that Conway disciplined her in May 2000 because she engaged in protected activity.

### *The January 2001 Termination*

In October 2000, Walters held a routine once-a-week meeting with the designer team. Tr. 1514, 1741, 1944; JX 35. Sayre was off duty that week and therefore did not participate in the meeting. Afterwards, she learned that Walters and others had discussed the long-standing possibility that VECO might replace designers with technicians and transfer designers from the pump station to Fairbanks. The group speculated about which field designers would be willing to move to Fairbanks. Someone said that Sayre probably would not accept a transfer to Fairbanks because she had a house in Anchorage. Tr. 459-468, 1085; JX 35, 63.

When Sayre heard about this discussion, she became convinced that it was Walters who said that she probably would not accept a transfer to Fairbanks. She complained to VECO's human resources department that Walters was spreading false, "offensive" rumors about her. And when Walters learned about Sayre's complaint, he filed an ECP hostile work environment complaint against Sayre. Tr. 2016-2016; JX 35.

VECO hired Atkinson again to investigate Sayre's ECP complaint against Walters and Walters's ECP complaint against Sayre. Tr. 2016-2017, 2045. In his report, Atkinson described Sayre's complaint as alleging that "Walters was harassing her by spreading unfounded rumors about her." JX 35 p. 921. Atkinson found that "[a]ll witnesses are in agreement that Ms. Sayre was not a singular topic of conversation and that no derogatory remarks are [sic] made regarding Jeanne or anyone else." *Id.* at 922. And when Atkinson interviewed her, Sayre's only explanation for complaining about Walters was that she had heard that Walters had told the designer team that she would be "pulled into Fairbanks and replaced with a Document Specialist." Atkinson therefore concluded that Sayre could not have reasonably believed that Walters said anything disparaging about her. *Id.* at 923.

Meanwhile, during Atkinson's investigation, Sayre discovered what she believed to be a major equipment tagging error by fellow VECO employees at the NPMS. Tr. 241-242, 472-486; JX 35 p. 934. She immediately sent a detailed email to eight Alyeska managers, describing the situation in alarming terms. She did not notify VECO officials about this concern, and when they found out that Sayre had contacted Alyeska, they felt

“blindsided” because they had not had an opportunity to discuss Sayre’s concerns with Alyeska, their client. VECO Brief at 19. Furthermore, Alyeska employees did not possess expertise in tagging issues. Tr. 479, 1168, 1747. In fact, the Alyeska manager to whom Sayre sent her email immediately forwarded it to Sayre’s VECO supervisor to ask what was going on. Tr. 479; JX 35. Therefore, VECO asked Atkinson to investigate this event. JX 35. Atkinson found that Sayre acted unreasonably in failing to tell VECO about the situation. JX 35 p. 924.

Val Molyneux replaced Conway as VECO president in early 2000. Based on Atkinson’s report, information he gleaned from depositions taken during discovery of Sayre’s whistleblower complaint about the earlier reprimands and suspension, and what he had learned about the Sayre litigation when he first replaced Conway, Molyneux decided to fire Sayre. Molyneux Deposition 4, 9-17.

The ALJ found that Sayre engaged in protected activity when she expressed concerns about tagging to Alyeska and that VECO became aware of Sayre’s concern. R. D. & O. at 102. Neither VECO nor Alyeska challenges these findings, and we accept them as uncontested. Termination is, of course, an adverse employment action. Nonetheless, as with Sayre’s other claims, the ALJ found that VECO did not fire Sayre because of her protected activity. The ALJ found that the allegation against Walters was unfounded and that Sayre’s decision to report the tagging problems to Alyeska “did not further the interests of either company.” R. D. & O. at 104. He further noted that had Sayre spoken to the VECO workers she knew were responsible for the tagging, she would have found out that VECO was in the process of working through the issues. *Id.*

We construe Sayre’s argument with this finding to be that Atkinson’s report was incorrect and that therefore, presumably, Molyneux’s reliance upon it constitutes a pretext for discrimination. Sayre contends that Atkinson should not have found that she “intentionally mischaracterized” the situation when she accused Walters of spreading false rumors about her. S. O. Br. at 41. For this argument Sayre relies on the fact that her supervisor and a coworker told Atkinson only that “there was speculation” during the meeting “whether Sayre would agree to relocate” and “whether Sayre’s position would be moved to Fairbanks or Anchorage.” *Id.*, citing JX 36, 43. But the supervisor and coworker accounts of what was said at the meeting support Atkinson’s finding that Sayre had mischaracterized the situation. JX 36, 43.

Sayre also argues that Atkinson was wrong to report that she told Alyeska about the tagging problems without telling VECO. According to Sayre, she “attempted to contact VECO regarding the tagging issue.” S. O. Br. at 44. But the email that Sayre cites to prove that she notified VECO is an email she sent to an Alyeska engineer, and it was sent after Sayre first contacted Alyeska about the tagging issue. SX 128.

Finally, Sayre argues that Molyneux testified that he fired her for circumventing VECO’s chain of command, thereby admitting that he unlawfully retaliated against her. S. O. Br. at 47, citing Molyneux Deposition at p. 14. But this argument fails because it takes part of Molyneux’s testimony out of context. After recounting the events that led to

Sayre's first and second reprimands, Molyneux testified that, "[t]he main reason for me discharging Sayre was the hostility she was generating amongst my people." Molyneux Deposition at 14. Molyneux then added that this hostility was due in part to Sayre's practice of telling Alyeska, but not VECO, about safety issues that affected VECO. "[F]rom time to time she would communicate directly to Alyeska, the client, as opposed to VECO. . . ." *Id.* Thus, though Molyneux thought Sayre breached a duty to give her own employer, VECO, information it was entitled to have, he did not testify that he fired Sayre because she had gone to Alyeska with her concerns about tagging.

We also reject Sayre's chain of command argument because the law on which she relies does not apply here. Sayre cites *Dutkiewicz v. Clean Harbors Env'tl. Servs., Inc.*, ARB No. 07-090, ALJ No. 95-STA-34, slip op. at 7 (ARB Aug. 8, 1997), *aff'd sub nom., Clean Harbors Env'tl. Servs., Inc. v. Herman*, 146 F.3d 12, 24 (1st Cir. 1998). There we held that, "an adverse action taken because an employee circumvented the chain of command to raise a safety issue would violate the employee protection provision." *See also Talbert v. Washington Pub. Power Supply Sys.*, ARB No. 96-023, ALJ No. 93-ERA-35, slip op. at 8 (ARB Sept. 27, 1996) ("an employer may not, with impunity, discipline an employee for failing to follow the chain-of-command, failing to conform to established channels or circumventing a superior"). Thus, Sayre argues that disciplining her for not telling VECO about the tagging issues violates the whistleblower protection provisions.

But Sayre's argument goes too far. The environmental whistleblower protections do not deprive employers of the right to require employees to tell them immediately about hazardous conditions. *See Hall v. United States Army*, ARB Nos. 02-108, 03-013, ALJ No. 1997-SDW-00005, slip op. at 23 n.15 (ARB Dec. 30, 2004). This is not a case in which the employee expressed protected safety or environmental concerns outside the chain of command because the company had been unresponsive to the employee's complaints or because the employee reasonably feared reprisals if she took her concerns to supervisors. Indeed, Sayre testified that she sent her message to Alyeska because she had sent that kind of information to Alyeska in the past and an Alyeska employee was in charge of work at the NPMS. Tr. 286, 289-290. Therefore, we find that Sayre did not demonstrate by a preponderance of the evidence that Molyneux fired her because she revealed her tagging concerns to Alyeska.

## **C. Sayre's Arguments**

### **1. Johnson's Role**

Having found that Conway and Molyneux did not retaliate because of her protected activity, we now consider Sayre's argument that VECO nevertheless violated the whistleblower protections because Conway and Molyneux relied on Atkinson's reports that Sayre's supervisor, Johnson, "tainted." Sayre contends that Johnson was antagonistic toward her because of her earlier whistleblower complaints against VECO and therefore orchestrated a series of events that culminated in Conway and Molyneux's adverse actions against her. Thus, because the reprimands, suspension, and termination

were based upon a process that Johnson “tainted,” these adverse actions should be deemed retaliatory and violations of the whistleblower protections. S. O. Br. at 12, 15-19, 23, 24.<sup>6</sup>

Sayre argues that Johnson’s campaign against her began when Johnson encouraged Sayre’s coworkers to fear that Sayre would complain about their work to ECP, OSHA, or another agency and that they might therefore lose their jobs. As a result, Sayre says, the coworkers avoided her. *Id.* at 15, 16, 24-25. Thus, drawing revisions and other work involving Sayre began to pile up. Then, according to Sayre, Johnson colluded with Walters to produce a complaint that Sayre was creating a hostile environment that impeded work. S. O. Br. at 20-21, 24. Johnson then passed the bogus complaint on to Palazzotto for investigation. S. O. Br. at 19. When Atkinson arrived at Fairbanks to investigate, Sayre says that Johnson steered him toward negative information and away from positive information about her. She says Johnson misdirected Atkinson again when he conducted his second investigation. S. O. Br. at 14, 15, 17, 18, 26, 27, 28, 34, 35.

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<sup>6</sup> Sayre provides no authority for her theory that VECO should be liable because of Johnson’s influence on Atkinson, whose reports Conway and Molyneux, the decision makers, relied upon. We are aware that, under special circumstances, an employer may be liable for employment discrimination even though the official decision maker lacked an illegal motive. This occurs when a prejudiced participant in the decision making process manipulates the unwitting official decision maker into the illegal act. *Cf. Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31 (ARB Sept. 30, 2003) (holding employer liable based on the retaliatory intent of a supervisor who persuaded the innocent decision maker to fire a nuclear whistleblower). Sayre, however, does not make this argument. At any rate, as we discuss above, Johnson did not influence Atkinson and thus influence Conway and Molyneux. Nor did Johnson have a direct role in the decisions to discipline Sayre. Sayre implies that Johnson influenced Molyneux’s decision to fire her because Molyneux “consulted with” Johnson. S. O. Br. at 48. But the record demonstrates otherwise. Molyneux testified that when he became VECO president in spring 2000, Johnson told him about VECO’s litigation with Sayre and that she would like a transfer to avoid supervising Sayre. Molyneux Deposition 7-9. This was months before the events that led to Atkinson’s third investigation and Molyneux’s decision to fire Sayre. And by that time, Johnson no longer was Sayre’s supervisor, having left the Fairbanks office in April 2000, nine months before Sayre was fired. Tr. 1755, 1883. Nor did Johnson recommend to Conway that Sayre be disciplined or otherwise participate in Conway’s disciplinary decision making process. Conway, Johnson, and Palazzotto all testified that Johnson played no role in Conway’s decision-making process. Tr. 954-957, 1778, 1872, 1891, 2000-2001, 2005. Conway testified that he relied entirely on Atkinson’s reports. Tr. 952-957; 1976.

### ***Coworker Fears***

Sayre argues that no one would have avoided her and there would not have been a slow down in productivity if Johnson and Walters had not encouraged her coworkers to fear her. S. O. Br. at 24-25. According to Sayre, Johnson and Walters encouraged her colleagues to be afraid of her by telling them about Sayre's ECP complaints about their work and her whistleblower complaints against VECO. *Id.* at 15, 16.

But the record does not support Sayre's claim that Johnson (and Walters) caused her colleagues to fear she would complain about their work and cause them problems at work. We find no evidence that Johnson or Walters warned the other workers about the possibility of Sayre filing an ECP complaint against them. In fact, they already knew about Sayre's propensity to file complaints because ECP interviewed the employees whose work Sayre criticized. And, according to one of Sayre's coworkers, when the ECP investigated their work, "it was pretty well understood by everybody that it [the ECP complaint] had come from" Sayre. Tr. 1592-1593. Moreover, they also knew about Sayre's PS 3 case because there had been a public hearing, VECO had been required to post the resulting ALJ decision in her favor, and Sayre's attorney had issued a press release about the decision. Tr. 594; AX 50, 52.

### ***Colluding with Walters***

According to Sayre, Johnson also colluded with Walters to concoct the September 1999 complaint, which she sent to Palazzotto and Conway, that Sayre's abrasive manner was creating a hostile work environment. S. O. Br. at 20-21. Sayre contends that Johnson took this action because she learned that Sayre met with Alyeska president Bob Malone to tell him about hundreds of drawing deficiencies at PS 7. S. O. Br. at 20-21. During the time that Johnson supervised her, however, Sayre was constantly reporting drawing deficiencies to Alyeska officials, the United States Congress, JPO, the Vice President of the United States, and various federal agencies. Tr. 58, 61, 68, 69, 103, 106, 111, 120, 128-130, 183-184, 244, 327, 380, 399, 403, 563-565, 638, 679-680, 2083, 2085; JX 64; SX 34, 40, 76, 84, 105; VX 65. Johnson was very aware that this was Sayre's continuing mode of operation. Tr. 1833, 1838, 1840, 1841, 1857, 1861, 1862, 1872. Thus, Sayre's theory that Johnson retaliated because she met with Malone is not plausible. And, we note, the testimony Sayre cites does not establish when Johnson learned about Sayre's meetings with Malone. Tr. 1918-1919.

In addition, the substance of Walters's written (email) complaint was that members of the designer team were avoiding Sayre because of her unpleasant manner, which slowed down work, and that one individual had particularly complained to him about Sayre's conduct at a meeting earlier in the month. JX 59. Sayre disputes the content of Walters's email, arguing that these team members testified that they either did not want to file a complaint about her or that they had not even reported any concerns about her to Walters. S. O. Br. at 19-20. But, in fact, these same coworkers did confirm the contents of the Walters complaint when they testified. Tr. 1082, 1083, 1492-1495, 1504, 1568, 1675.

Finally, Sayre asserts that collusion between Walters and Johnson is evidenced by the fact that Walters's email complaint to Johnson is dated several days after Johnson told Conway and Palazzotto that Walters had complained. S. O. Br. at 20-21. But Johnson testified that Walters first spoke to her in her office about his concerns and that she told him to send his complaint to her in writing. Tr. 1763-1768. While Walters was composing his written complaint, Johnson related her earlier conversation with Walters to Conway and Palazzotto. SX 9. Johnson testified she had nothing to do with drafting Walters's written complaint. Tr. 1763-1768. Sayre has not rebutted this evidence. Johnson's testimony that she asked Walters to write the complaint after their discussion is entirely credible. The mere fact that Walters followed up in writing does not prove that Walters and Johnson colluded to produce a false complaint against Sayre.

### *Misdirecting Atkinson's Investigations*

Sayre contends that Johnson "tainted" Atkinson's investigations by giving him negative information about her and withholding positive information. According to Sayre, Johnson also tainted Atkinson's investigations by giving him names of people to interview, voicing criticisms of Sayre that OSHA had already found to be retaliatory and ordered expunged, and telling Atkinson she had developed ulcers from dealing with Sayre. S. O. Br. at 15-18, 34. Although Sayre does not explain how these actions relate to her theory of the case, we infer that she considers them to be circumstantial evidence of retaliatory intent. But her attacks on Atkinson's investigations fail because the record does not support them.

With respect to the first two investigations, the record simply does not support Sayre's claim that, by artful giving and withholding of information, Johnson led Atkinson to form a negative picture of Sayre. Implicit in Sayre's argument is the notion that Johnson's comments and suggestions would have carried special weight with Atkinson. But the record shows that it was Palazzotto, not Johnson, who gave Atkinson his cues. Palazzotto was the company official who selected and hired Atkinson. And before each investigation Palazzotto met with him, told him about the issues and key players, and most importantly, gave him carte blanche to conduct the investigations as he deemed appropriate. Johnson was just one of many witnesses he interviewed. Tr. 1993, 2009, 2010, 2017, 2018.

As for Palazzotto, Sayre cites her testimony that she did not tell Atkinson about Sayre's earlier whistleblower litigation because she wanted Atkinson to find things out by himself and not begin his investigation with preconceptions. S. O. Br. at 14. From this, Sayre claims that Atkinson "was specifically informed by VECO that he was not to receive information regarding Ms. Sayre [sic] prior complaints of retaliation and her protected activity." S. O. Br. at 14. Palazzotto's decision not to tell Atkinson about Sayre's history, however, is far from ordering him not to find out about it. In fact, Atkinson did learn that Sayre had successfully litigated against VECO in the past – from Sayre herself. Sayre also claims that her nomination for a safety award in 1999 "was kept from" Atkinson. S. O. Br. at 27-28. However, we find no evidence that anyone

“kept” this information from Atkinson, and there was nothing to stop Sayre from telling him.

Moreover, Sayre did not adduce any evidence that Atkinson overlooked facts or used false information from Johnson. On the contrary, witnesses largely confirmed Atkinson’s written reports. Tr. 1005-1007, 1082, 1083, 1555, 1568, 1671, 1675, 1495, 1504, 1508-1513, 1514, 1515, 1945-1946, 1953, 1603, 1611-1620. Indeed, Sayre herself conceded that many of Atkinson’s findings about her were correct. For instance, she admitted that “a lot of people” were afraid of her and that her behavior had a chilling effect on the workplace. Tr. 657, 570. She also conceded that some of her emails were disrespectful. Tr. 556, 557. And she admitted that at least some of Johnson’s criticisms were warranted. Tr. 332.

Nevertheless, Sayre argues that Atkinson accepted whatever Johnson told him, true or false. S. O. Br. at 26, 27. As an example, she cites Johnson telling Atkinson about a staff meeting concerning format requirements for sending engineering packages to JPO. At this meeting Johnson said: “[S]end all your letters to JPO through me.” Tr. 207. Sayre took this to mean that she had to show Johnson any confidential safety complaints Sayre might send to JPO. Therefore, she filed an ECP complaint. ECP investigated Sayre’s complaint and interviewed 21 individuals who heard Johnson’s instructions. AX 94 at 479-482. No one thought Johnson meant they must send whistleblower complaints through her. And when Atkinson was looking into this incident as part of his first investigation, he interviewed other participants, as well as Johnson, and concluded that Sayre’s interpretation of what Johnson had said was unreasonable. Tr. 1324-1325. Thus, the record does not support Sayre’s theory that Atkinson’s report merely parroted Johnson’s version of what happened at the meeting.

Similarly, Sayre argues that Atkinson found that she falsely accused her coworker at PS 7 of cheating on his time sheets merely because Johnson told him this happened. S. O. Br. at 16. Sayre contends that she never made such an accusation to Johnson and that therefore Johnson must have intentionally misled Atkinson. *Id.* at 16-17; Tr. 174, 337, 339-340. But Johnson testified that Sayre told her the coworker cheated, and the record contains a letter from Sayre to OSHA in which she complained that VECO was being strict with her but was not punishing her coworker for cheating. Tr. 1824; VX 45. Thus, we find that Sayre told Johnson that the coworker cheated and that Atkinson, therefore, had reason to rely upon Johnson’s information.

Sayre also argues that Atkinson did not conduct fair investigations because, for example, he spent more time on Walters’s hostile work environment complaints against her than on her rumor-mongering complaint against Walters. She claims as well that Atkinson waited until the very end of his third investigation before he interviewed her and that he did not follow ECP procedures in any of his investigations. S. O. Br. at 41, 43. Again, however, the record belies Sayre. While Atkinson did in fact spend slightly more time on Walters’s hostile environment complaint than on Sayre’s rumor complaint, Sayre has not demonstrated how this fact alone constitutes evidence of retaliatory intent. Tr. 1139, 1175, 1404; JX 48. As to Atkinson waiting to interview her, Sayre refused to

be interviewed at the beginning of the third investigation, and she did not return Atkinson's calls to schedule an interview. Tr. 1145-1146, 2086. As to not complying with ECP procedures, VECO hired Atkinson in response to Sayre's objections that the ECP should not be involved because Palazzotto, ECP's liaison, would be biased against her. Tr. 129, 326, 622.

## 2. Protected Sarcasm

Sayre argues that VECO may not discipline her for the manner in which she engaged in protected activity, i.e., how she expressed her views about the drawing project deficiencies. S. O. Br. at 30-31, 37, 38. Atkinson found that some of Sayre's emails were "confrontational," that she was rude to her colleagues, that she created a tense atmosphere in meetings, that she used inflammatory language, and that she was frequently uncooperative. JX 4, 22, 35. Sayre contends that Johnson provoked the sarcasm and satire in her emails because, "Johnson openly accused her of wrongdoing in making protected disclosures to the Alyeska ECP and to the DOL." S. O. Br. at 31. She also points out that since her other language and behavior were not malicious, or obscene, or accompanied by violence, they were protected and could not be the basis for discipline. *Id.* at 31.

But Sayre misapprehends the law. "An employee's insubordination toward supervisors and coworkers, even when engaged in a protected activity, is justification for termination." *Kahn v. United States Sec'y of Labor*, 64 F.3d 271, 279 (7th Cir. 1995) (affirming Secretary's determination that auditor's abusive and inappropriate manner while making protected complaints was the legitimate, nondiscriminatory reason for his firing). *See also Dunham v. Brock*, 794 F.2d 1037, 1041 (5th Cir. 1986) ("an otherwise protected 'provoked employee' is not automatically absolved from abusing his status and overstepping the defensible bounds of conduct").

Sayre relies on *Kenneway v. Matlack, Inc.*, 88-STA-20, slip op. at 6 (Sec'y June 15, 1989), in which the Secretary stated: "[T]he right to engage in statutorily-protected behavior permits some leeway for impulsive behavior, which is balanced against the employer's right to maintain order and respect in its business by correcting insubordinate acts." We recently held that this "leeway for impulsive behavior" standard applies to situations that "involve impulsive conduct incidental to the protected activity where the complainant is emotionally motivated" and the "conduct is temporary and uncalculated." *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 99-STA-37, slip op. at 15 (ARB Dec. 31, 2002), *aff'd on other grounds, Harrison v. Administrative Review Bd.*, 390 F.3d 752, 759 (2d Cir. 2004). *Harrison* holds that the "leeway" principle does not apply to typical safety complaints, which tend to be "deliberate" and "reasoned." *Id.* Thus, since Sayre's conduct was more deliberate and reasoned than impulsive and uncalculated, VECO properly disciplined her, in part, for her discourteous and insubordinate manner.



## **CONCLUSION**

Sayre did not prove by a preponderance of the evidence, as she must, that Conway and Molyneux reprimanded, suspended, and terminated her employment because she criticized the drawing update project or otherwise expressed safety concerns. Nor does the record support her arguments that VECO is liable because Johnson tainted Atkinson's investigation or because VECO disciplined her for the sarcastic and confrontational manner in which she expressed her safety concerns. As a consequence, we **DISMISS** the complaint.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**